Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–544 OF 2011

ABDUL MALIK ISHAK, ABU SAMAH AND LINTON ALBERT JJCA

17 MAY 2013

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Contract — Breach — Agreement — Terms — Appeal against decision of High Court — Land slide — Remedial works on land — Temporary occupation of land agreement — Whether agreement breached — Whether land entered and occupied more than prescribed time without approval — Whether 'as-built' drawing for works provided — Whether joint final inspection carried out — Whether excavated earth removed — Compensation — Claim for alleged potential and present losses

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In the present appeal, the appellant appealed against the judgment entered by the High Court in favour of the respondent. The respondent was the registered proprietor of three pieces of land ('the lands') which were planted with oil palm trees and known as Lot 2391, Lot 4197 and Lot 2392. The lands were all located at Mukim Ayer Putih, Daerah Pendang, Kedah. The appellant was the North-South Highway Concessionaires who built the highway just next to the lands. Sometime in January 2000, a landslide occurred at a hill on the lands, known as Bukit Jenun within the side of the appellant's right of the way. The appellant entered into the lands belonging to the respondent to carry out remedial works as a result of the landslide. Subsequently, the appellant sought to enter into a temporary occupation agreement ('TOA') with the respondent and, consequently, breached the terms of the TOA and damaged the lands belonging to the respondent, causing loss and damage. The respondent's complaints were: that the appellant had entered and occupied Lot 2391 more than the authorised six months without the approval of the respondent; that the appellant failed to provide an 'as-built' drawing for the works which were done on Lot 2391; that the appellant failed to carry out a joint final inspection which was to be done within seven days from the date of the completion of the works; that the appellant failed to remove the excavated earth from Lot 2391 and the earth was also dumped all over Lot 2391, Lot 4197 as well as Lot 2392; and that the appellant failed to provide compensation to the respondent in accordance to the specified scale. Based on these breaches, the respondent claimed for alleged potential and present losses. In the High Court, the claims were allowed. In the present appeal, the appellant addressed each and every breach and argued that the High Court judge erred in law and in fact in allowing the respondent's claim without taking into consideration the totality of the evidence and the facts which clearly showed that the entire claim of the

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respondent was not sustainable in law and the appeal ought to be allowed with costs.

Held, allowing the appeal with costs:

(1) It was crystal clear that the contention by the respondent that the appellant had breached the TOA by remaining on Lot 2391 exceeding the six months without the written authority of the respondent was untrue. When the appellant remained on Lot 2391 to complete the rectification works, it was done within the ambit and scope of the TOA (see para 24).

(2) It was wrong to say that the appellant failed to provide the 'as-built' drawing for the works to be done on Lot 2391. In fact, the appellant complied with the TOA by providing the 'as-built' drawing which was endorsed by a licensed surveyor and, in this context; there was no breach of contract by the appellant (see para 26).

(3) The High Court judge erred in law and in fact when he concluded that there was an act of negligence by GFE and the appellant was vicariously liable for what GFE did without taking into account that all acts of dumping of the excavated earth were done on the instructions of the respondent based on the June agreement. It must be borne in mind that the obligation to remove the excavated earth under the TOA was on the respondent (see para 72).

(4) The High Court judge also erred in law and in fact when he ruled that the respondent had proved negligence on the part of the appellant on the balance of probability without considering the salient fact that it was the intervening act of the respondent in instructing GFE to dump the excavated earth that caused the negligence (see para 73).

(5) In regard to the issue of dumping, the learned High Court judge erred in law and in fact when he accepted the evidence of witnesses who had testified that they had not seen the TOA and the June agreement. That being the case, these witnesses had no knowledge and were not privy to the issues of earth excavation and dumping (see para 89).

(6) This was a fit case for appellate intervention. The advantage enjoyed by the High Court judge by reason of having seen and heard the witnesses could not sufficiently explain or justify His Lordship's conclusion. The High Court judge had not taken proper advantage of his enviable position of having seen and heard the witnesses and such failure had put the matter at large for this court to peruse and dissect the facts and the law based on the appeal records. A non-direction of this magnitude constituted a fundamental misdirection and it invited appellate intervention (see para 133).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu merayu terhadap penghakiman yang diberikan oleh Mahkamah Tinggi yang berpihak kepada responden. Responden merupakan pemilik berdaftar tiga bidang tanah ('tanah-tanah tersebut') yang ditanam dengan pokok-pokok kelapa sawit dan dikenali sebagai Lot 2391, Lot 4197 dan Lot 2392. Tanah-tanah tersebut terletak di Mukim Ayer Putih, Daerah Pendang, Kedah. Perayu merupakan pemegang konsesi Lebuhraya Utara-Selatan yang membina lebuhraya bersebelahan dengan tanah-tanah tersebut. Lebih kurang pada Januari 2000, satu tanah runtuh berlaku pada bukit-bukit di atas tanah-tanah tersebut, yang dikenali sebagai Bukit Jenuh, pada bahagian hak lalu-lalang perayu. Perayu memasuki tanah-tanah milik responden untuk menjalankan kerja-kerja pembaikan akibat tanah runtuh tersebut. Berikutan itu, perayu memasuki perjanjian pendudukan sementara ('PPS') dengan responden dan seterusnya, melanggar terma-terma PPS dan merosakkan tanah-tanah milik responden, menyebabkan kerugian dan kerosakan. Aduan-aduan responden adalah bahawa: perayu telah memasuki dan menduduki Lot 2391 lebih daripada enam bulan yang dibenarkan tanpa kebenaran responden; bahawa perayu gagal memperuntukkan lukisan 'seperti dibina' bagi kerja-kerja yang dilakukan pada Lot 2391; bahawa perayu gagal menjalankan pemeriksaan bersama terakhir yang sepatutnya dilakukan dalam tujuh hari dari tarikh penyelesaian kerja-kerja; bahawa perayu gagal mengeluarkan tanah yang digali daripada Lot 2391 dan tanah tersebut dibuang atas Lot 2391, Lot 4197 dan juga Lot 2391; dan bahawa perayu gagal memperuntukkan pampasan kepada responden selaras dengan skala yang dinyatakan. Berdasarkan pelanggaran-pelanggaran ini, responden menuntut bagi dakwaan kerugian semasa dan berpotensi. Di Mahkamah Tinggi, tuntutan-tuntutan tersebut dibenarkan. Dalam rayuan ini, perayu mengutarakan setiap satu pelanggaran dan menghujahkan bahawa hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta dalam membenarkan tuntutan responden tanpa menimbangkan keseluruhan keterangan dan fakta-fakta yang jelas menunjukkan bahawa keseluruhan tuntutan responden tidak boleh dipertahankan dan rayuan sewajarnya dibenarkan dengan kos.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah jelas bahawa hujahan responden bahawa perayu telah melanggar PPS dengan kekal berada di Lot 2391 melebihi enam bulan tanpa kebenaran bertulis responden adalah tidak benar. Semasa perayu berada di Lot 2391 untuk menyelesaikan kerja-kerja pembaikan, ia dilakukan dalam skop dan ruang lingkup PPS (lihat perenggan 24).

(2) Adalah salah untuk menyatakan bahawa perayu gagal memperuntukkan lukisan 'seperti dibina' bagi kerja-kerja yang perlu diselesaikan pada Lot 2391. Malahan, perayu mematuhi PPS dengan memperuntukkan

lukisan 'seperti dibina' yang diendors oleh juruukur berdaftar dan dalam konteks ini, tiada pelanggaran kontrak oleh perayu (lihat perenggan 26).

(3) Hakim Mahkamah Tinggi terkhilaf dalam undang-undang dan fakta apabila beliau memutuskan bahawa terdapat perlakuan cuai oleh GFE dan bahawa perayu bertanggungan secara vikarius bagi tindakan GFE tanpa mengambil kira bahawa tindakan-tindakan membuang tanah-tanah yang digali dibuat berdasarkan arahan-arahan responden dalam perjanjian Jun. Harus diingat bahawa kewajipan mengeluarkan tanah yang digali di bawah PPS terletak pada responden (lihat perenggan 72).

(4) Hakim Mahkamah Tinggi juga terkhilaf dalam undang-undang dan fakta apabila beliau memutuskan bahawa responden gagal membuktikan kecuaian perayu atas imbangan kebarangkalian tanpa menimbangkan fakta penting bahawa campur tangan responden dalam mengarahkan GFE untuk membuang tanah yang digali tersebut yang telah menyebabkan kecuaian (lihat perenggan 73).

(5) Berkenaan isu pembuangan, Yang Arif hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta dalam menerima keterangan saksi-saksi yang memberi keterangan bahawa mereka tidak melihat PPS dan perjanjian Jun. Dengan itu, saksi-saksi ini tidak mempunyai pengetahuan dan tidak privi ke atas isu-isu pembuangan dan penggalian tanah (lihat perenggan 89).

(6) Ini adalah kes yang sesuai bagi campur tangan rayuan. Kelebihan yang dinikmati oleh hakim Mahkamah Tinggi iaitu melihat dan mendengar saksi-saksi tidak menjelaskan atau menjustifikasikan keputusan beliau. Hakim Mahkamah Tinggi tidak mengguna pakai kelebihan ke atas kedudukan beliau yang melihat dan mendengar keterangan-keterangan dan kegagalan tersebut telah meletakkan perkara tersebut pada umumnya untuk mahkamah ini untuk meneliti dan mengasingkan fakta dan undang-undang berdasarkan rekod rayuan. Sesuatu ketidakarahan diri sebesar ini merupakan satu salah arah asas dan ia mengundang campur tangan rayuan (lihat perenggan 133).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2926–2936.

Cases referred to

Albacruz (Cargo Owners) v Albazero (Owners), The Albazero [1977] AC 774, HL (refd)

Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, HL (refd)

Ang Hock Hai v Tan Sum Lee & Anor [1957] 1 MLJ 135 (refd)

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Banco de Portugal v Waterlow And Sons, Limited, Waterlow And Sons, Limited v Banco de Portugal [1932] AC 452, HL (refd)
Beaumont v Greathead (1846) 2 CB 494 (refd)
Blyth v Birmingham Waterworks Co (1856) 11 Exch 781 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] CLJ 283, FC (refd)
British Transport Commission v Gourley [1956] AC 185, HL (refd)
Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 1 All ER 53, CA (refd)
Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)
Christie v Davey [1893] 1 Ch 316, Ch D (refd)
Davey v Harrow Corporation [1958] 1 QB 60, CA (refd)
Directors, etc of the St Helen's Smelting Company, The v William Tipping [1865] 11 HLC 642, HL (refd)
Equitable Life Assurance Society v Hyman [2000] 3 All ER 961, HL (refd)
Feize v Thompson (1808) 1 Taunt 121 (refd)
General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd [1975] 1 WLR 819, HL (refd)
Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Hadley and Another v Baxendale and Others (1854) 9 Exch 341 (refd)
Hayward and Another v Pullinger & Partners Ltd [1950] 1 All ER 581, KBD (refd)
Heasmans v Clarity Cleaning Co Ltd [1987] IRLR 286, CA (refd)
Hilton v Thomas Burton (Rhodes) Ltd and Another [1961] 1 WLR 705 (refd)
Hoon Wee Thim v Pacific Tin Consolidated Corporation [1966] 2 MLJ 240 (refd)
Ilkiw v Samuels and Others [1963] 1 WLR 991, CA (refd)
John Rylands and Jehu Horrocks v Thomas Fletcher (1868) LR 3 HL 330; (1865) 3 H&C 774, HL (refd)
Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65, CA (refd)
Koufos v C Czarnikow Ltd, The Heron II [1969] 1 AC 350, HL (refd)
Lever Brothers, Limited, And Others v Bell And Another [1931] 1 KB 557 CA (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (distd)
Livingstone v The Rawyards Coal Company (1880) 5 App Cas 25, HL (refd)
Mohamad Khalid bin Yusuf v Datuk Bandar Kuching Utara [2007] 5 MLJ 414; [2007] 9 CLJ 314, HC (refd)
Monarch Steamship Co, Limited v Karlshamns Oljefabriker (A/B) [1949] AC 196, HL (refd)
Mostyn v Coles (1862) 7 H & N 872 (refd)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)

Narayanan v Kannamah [1993] 3 MLJ 730, HC (refd)
Ng Kim Cheng v Naigai Nitto Singapore Pte Ltd & Anor [1991] 2 MLJ 296; [1991] 4 CLJ (Rep) 1009, HC (refd)
Pacific Tin Consolidated Corporation v Hoon Wee Thim [1967] 2 MLJ 35, FC (refd)
Pioneer Shipping Ltd and others v BTP Tioxide Ltd [1982] AC 724, HL (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)
Rose v Plenty And Another [1976] 1 WLR 141, CA (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Sapwell v Bass [1910] 2 KB 486, KBD (refd)
Sedleigh-Denfield v O'Callaghan and others [1940] AC 880, HL (refd)
Serangoon Garden Estate Ltd v Marian Chye [1959] 1 MLJ 113 (refd)
Southwark London Borough Council v Mills And Others [1999] 2 WLR 409, CA (refd)
Storey v Ashton (1869) LR 4 QB 476, QBD (refd)
Subramanian v Retnam [1966] 1 MLJ 172 (refd)
Susanna Holmes v Wilson and Two Others [1839] 10 Ad & E 502, KBD (refd)
Swingcastle Ltd v Gibson Alastair (a firm) [1991] 2 AC 223, HL (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)
Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd [2011] 4 MLJ 593, CA (refd)
Wheeler and another v JJ Saunders Ltd and others [1996] Ch 19; [1995] 2 All ER 697, CA (refd)
Wilsons & Clyde Coal Company Limited v English [1938] AC 57, HL (refd)
Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan [1987] 1 MLJ 393, SC (refd)
Wong See Leng v C Saraswathy Ammal [1954] 1 MLJ 141, CA (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to
Rules of the High Court 1980 O 18

Appeal from: Civil Appeal No 22–172 of 2003 (High Court, Pulau Pinang)

N Sivamohan (Sivamohan Rajendran & Co) for the appellant.
Surinder Singh (Lee Khai with him) (Ong and Manecksha) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] After a full trial before the High Court, judgment was entered in favour

of the respondent (the plaintiff before the High Court) with costs of RM30,000. Aggrieved, the appellant (the defendant before the High Court) appeals to this court.

THE PARTIES

[2] The respondent is the registered proprietor of three pieces of land known as *Geran Mukim* No 3607, Lot No 2391 ('Lot 2391'), *Geran Mukim* No 2954, Lot No 4197 ('Lot 4197') and *Geran Mukim* No 3608, Lot No 2392 ('Lot 2392') and they are all located at Mukim Ayer Putih, Daerah Pendang, Kedah ('the lands').

[3] The appellant is the North-South Highway Concessionaires who built the highway just next to the lands belonging to the respondent.

THE BRIEF FACTS

[4] There is a hill known as Bukit Jenun on the lands belonging to the respondent. At the material time, the lands were planted with oil palm trees.

[5] Sometime in January 2000, there was a landslide at Bukit Jenun within the side of the appellant's right of the way. The appellant entered into the lands belonging to the respondent to carry out remedial works as a result of that landslide. Thereafter, the appellant sought to enter into a temporary occupation agreement dated 16 August 2000 ('the tol agreement') with the respondent and, consequently, breached the terms of the tol agreement and damaged the lands belonging to the respondent thereby causing loss and damage.

[6] In the statement of claim, the respondent sought for the following damages as reflected in para 13 which was worded as follows:

> 13. Memandangkan perkara-perkara yang tersebut di atas, plaintif telah mengalami kerugian dan kerosakan.
>
> Butir-Butir
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> A Pampasan mengikut skala yang ditetapkan:

Lot		RM
2391	Keluasan tanah yang terlibat 544,891.97 kaki persegi x RM6 x 30%	980,805.19
	4050 pokok kelapa sawit (satu pokok Setiap 134.55 kaki persegi) x RM129	522,450.00
2392	Keluasan tanah yang terlibat 88,523.93 kaki persegi x RM6 x 30%	159,343.07

	658 pokok kelapa sawit x RM129	84,882.00
4197	Keluasan tanah yang terlibat 100,584.78 kaki persegi x RM6 x 30%	181,052.60
	748 pokok kelapa sawit x RM129	96,492.00
		2,025,024.86
	Tolak pampasan yang telah dibayar	66,813.76
		1,958,211.10

B Kos pengukuran tanah berdasarkan keluasan: RM36,190.75.

C Kos untuk menstabilkan cerun bukit yang berhala Timur atas hartanah-hartanah tersebut dan kerja-kerja pemulihan tanah ('soil treatment') di hartanah-hartanah tersebut: 59,233.47 meter persegi x RM200 = RM11,846,694.00

D Yuran jurutera perunding dan juru ukur untuk kerja-kerja ukur tanah, tanah, penstabilan cerun bukit dan pemulihan tanah: RM 196,721.27.

E Kerugian sehari sebab tergendalanya projek perumahan atas hartanah-hartanah tersebut: RM3,500.00 sehari dari 16.02.2001 dan masih berlanjutan.

[7] And at para 14 of the statement of claim, the respondent sought for the following prayers:

14. Dan plaintif menuntut:

(a) Wang jumlah RM1,958,211.10;

(b) Secara alternatif atau selanjutnya gantirugi am;

(c) Selanjutnya gantirugi aggravated;

(d) Faedah;

(e) Kos;

(f) Lain-lain relief atau perintah selanjut yang dianggap patut oleh Mahkamah.

THE RESPONDENT'S CLAIM

[8] On 16 August 2000, the respondent and the appellant entered into a tol agreement. By this tol agreement, the appellant was allowed to do remedial works on the lands belonging to the respondent. The tol agreement contained the following clauses:

(a) that the appellant be given a temporary licence to enter and occupy part

of Lot 2391 for a period of six months from 16 August 2000–15 February 2001. The temporary licence can be extended with the written authority of the respondent;

(b) the appellant has to furnish an 'as-built' drawing for the works done on the said Lot 2391;

(c) a final joint inspection has to be conducted within seven days from the date of the completion of the works;

(d) the appellant has to demobilise and remove from Lot 2391 all plant, equipment, labour, rubbish, surplus material upon the completion of the works and in particular, the excavated material from Lot 2391 has to be thrown out of Lot 2391; and

(e) that the appellant has to compensate the respondent according to the scale prescribed within 60 days from the date of the issuance of the certificate of joint final inspection.

[9] The nub of the respondent's complaint can be seen at para 7 of the statement of claim which stipulated the following salient facts:

(a) that the appellant had entered and occupied Lot 2391 more than the authorised six months without the approval of the respondent;

(b) that the appellant failed to provide an 'as-built' drawing for the works which were done on Lot 2391;

(c) that the appellant failed to carry out a joint final inspection which was to be done within seven days from the date of the completion of the works;

(d) that the appellant failed to remove the excavated earth from Lot 2391 and the earth was also dumped all over Lot 2391, Lot 4197 as well as Lot 2392; and

(e) that the appellant failed to provide compensation to the respondent in accordance to the specified scale.

[10] Based on these breaches, the respondent alluded to the alleged potential and present losses as reflected in paras 8–10 of the statement of claim and in its original Malay language text, these paragraphs were worded as follows:

8. Defendan dengan membuangkan tanah-tanah yang digali dari Lot 2391 tersebut di merata-rata Lot 2391, Lot 2392 dan Lot 4197 tersebut khususnya pada cerun bukit yang berhala Timur atas hartanah-hartanah tersebut, tanpa mengambil langkah-langkah yang berpatutan untuk menstabilkan cerun bukit tersebut dan membina saluran air yang berpatutan, telah mengwujudkan keadaan yang membahayakan.

Butir-Butir

1 Keadaan cerun bukit yang tidak stabil mungkin menyebabkan keruntuhan tanah;

2 Plaintif mungkin didedahkan kepada pendakwaan oleh pihak berkuasa yang berkenaan;

3 Plaintif mungkin didedahkan kepada tuntutan daripada penduduk-penduduk di sekeliling hartanah-hartanah tersebut atas kacau-ganggu (nuisance) atau prinsip Rylands v. Fletcher.

9. Selanjutnya atas sebab perkara-perkara yang disebutkan di perenggan 8 di atas Plaintif tidak dapat menikmati kegunaan hartanah tersebut, khususnya rancangan Plaintif yang sedia ada untuk memajukan hartanah tersebut melalui satu projek perumahan telah tergendala dan Plaintif telah mengalami kerugian dan kerosakan.

10. Defendan dengan membuangkan tanah-tanah yang digali dari Lot 2391 tersebut di atas hartanah-hartanah lain Plaintif iaitu Lot 4197 dan Lot 2392 yang bersampingan dengan Lot 2391 tersebut, telah melakukan pencerobohan (trespass) dan kacau-ganggu (nuisance) atas hartanah-hartanah Plaintif tersebut. Atas sebab perkara-perkara yang disebutkan Plaintif tidak dapat menikmati kegunaan hartanah-hartanah tersebut, khususnya rancangan Plaintif yang sedia ada untuk memajukan hartanah-hartanah tersebut melalui satu projek perumahan telah tergendala dan Plaintif telah mengalami kerugian dan kerosakan.

[11] And the entire losses which the respondent sustained have been set out in para 13 of the statement of claim as alluded to earlier.

THE APPELLANT'S DEFENCE

[12] In its defence, the appellant addressed each and every breach which the respondent had itemised in the statement of claim and argued that the High Court judge erred in law and in fact in allowing the respondent's claim without taking into consideration the totality of the evidence and the facts which clearly showed that the entire claim of the respondent was not sustainable in law and the appeal ought to be allowed with costs.

ANALYSIS

[13] Learned counsel for the respondent argued that the appellant had entered into the lands belonging to the respondent and started 'slope rehabilitation works' as early as February 2000. It was emphasised that the appellant's agent by the name of Greenfield Engineering Sdn Bhd ('GFE') had cut the top of the hill and dumped all the earth onto the east side of the hill. Naturally this would cause damage to the respondent's lands. It was to remedy this damage that the tol agreement was entered into. Earlier there was a separate agreement dated 1 June 2000 entered between the respondent (represented by Khor Kok Seng ('SP3')) and GFE ('June agreement'). The June agreement can be seen at p 196 of the appeal record at *bahagian* 'C' and it was worded as follows:

Subject: Earthwork Disposal To Lot No 2391. 2392 & 4197 To Messrs. Khor Kok Seng, Mukim Aver Puteh, Daerah Pendang, Kedah

The aforesaid Earthwork Disposal to Lot No. 2391, 2392, 4197 of Mr. Khor Kok Seng have been discussed on 23/05/2000 after the joint inspection on the same date amongst the following parties:

(1) Mr. Khor Kok Seng — LAND OWNER representative of Kim Seng Enterprise (Kedah) Sdn Bhd (Lot 2391, 2392 & 4197).

(2) Greenfield Engineering Sdn Bhd referred as G.F. represented by Mr. Tan Ka Chong.

(3) PLUS represented by Ir. K. S. Soo, Ir. Ahmad Faidzal Fudil and Norehsan Abu Bakar.

For the proposed slope Rehabilitation works to cut slope at KM72.9 SB. Bukit Jenun, herein referred as PROJECT.

With the involvement of the abovesaid parties in good order, the following agreement and understanding during the joint inspection have been amicably confirmed by above (1), (2) and (3) parties.

(1) Mr. K. S. Khor agreed to absord all disposed earth quantity from the PROJECT for the land — filing at the said lots and build up to satisfactory formation platform, export of earth is not allowed by G.F. except the owner.

(2) PLUS agreed to maximize the cutting down top hill platform level (within the PROJECT budget) in order to cater for a wider platform and stable slope formation.

(3) Upon completion of the earth platform by G.F. to the LAND OWNER, G.F. shall furnish a Licensed Survey drawing as-built complete with (c/w) spot level to the completed earth platform for the LAND OWNER'S perusal.

(3.1) G.F. shall construct back the slope platform as per PROJECT design profile, i.e. 1:2 ratio slope complete with (c/w) proper compaction.

(3.2) G.F. to furnish with cover crops turfing to all at fill slope area.

(4) The insurance coverage for works, damage to persons and property, workman compensation shall be the same as per PROJECT Insured Policy.

The aforesaid agreements and understanding shall be witnessed and endorsed by all parties involved.

GREENFIELD ENGINEERING SDN BHD
Sgd. Illegible
Mr. Tan Ka Chong
Date:23/8/2000

Witness By
Sgd. Illegible
Name: Shaiful Desen
IC: 490601-02-5729
Date: 13/12/2001

LAND OWNER
Sgd. Illegible
Mr. Khor Kok Seng
I/C: 671109-02-5365
Date: 28/8/2000.

[14] There is no clause in the tol agreement that says that the June agreement is being superceded by the tol agreement. That being the case, both the agreements must be read harmoniously together in adjudicating the disputes between both the parties bearing in mind that the June agreement was also alluded to in paras 8.17–8.19 of the statement of defence. In ascertaining the intention of the contracting parties, it is always prudent to heed the words of Lord Diplock in *Pioneer Shipping Ltd and others v BTP Tioxide Ltd* [1982] AC 724 (HL), at p 736:

> The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them ….

[15] And Lord Steyn in *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961 (HL), at p 970 aptly said:

> The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.

[16] By virtue of the June agreement, the respondent had expressly agreed to absord all earth excavated for the project from the lands. The respondent also agreed that GFE shall fill the earth excavated from Lot 2391 for the purpose of the project at Lot 2391 as well as Lot 4197 and Lot 2392 in the same area.

[17] At this juncture, it is ideal to address each and every breach that the respondent has itemised in the statement of claim and deal with them accordingly. But before I do so, I must categorically state that the parties are bound by their pleadings. The parties are required to state the issues of fact and frame the questions of law in order to give notice of the case intended to be set up and to prevent either party to be taken by surprise at the trial. The material facts must be pleaded but the legal consequences need not be pleaded (*Wong See Leng v C Saraswathy Ammal* [1954] 1 MLJ 141 (CA), at p 142; *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65 (CA); *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 (CA); and *Lever Brothers, Limited, And Others v Bell And Another* [1931] 1 KB 557).

[18] What this amounts to is this. That the court is not entitled and should not decide a suit on an issue which is not pleaded. In short, the trial of the suit must be confined to the pleadings (*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC), at p 154) and the pleadings operate to effectively define and delimit with absolute clarity and precision the real matters in controversy between the parties. In this way, the parties could prepare their respective cases and the court too will adjudicate on those issues and no more (*Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 3 MLJ 730; *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC); *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (SC), at p 418; *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393 (SC); *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); and *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633).

[19] It is a correct statement of the law to state that where the case has been decided on an issue that is not raised in the pleadings, the judgment can be set aside forthwith.

[20] Having explained the legal semantics briefly, I will now proceed to examine the alleged breaches alluded to by the respondent in the statement of claim.

THAT THE APPELLANT HAD ENTERED AND OCCUPIED LOT 2391 MORE THAN THE AUTHORISED SIX MONTHS WITHOUT THE APPROVAL OF THE RESPONDENT

[21] The respondent alleged in para 5(a) of the statement of claim that the six months as reflected in the tol agreement started from 16 August 2000 and it ended on 15 February 2001. The respondent further referred to cl 2.1 of the tol agreement to justify their contention that the appellant had entered and occupied Lot 2391 exceeding the six months period without the approval of the respondent. Clause 2.1 of the tol agreement reads as follows:

> 2.1 Subject to the terms and conditions herein mentioned, the Owner hereby grants permission to PLUS to enter the Property and a temporary licence to occupy the Site for a period of six (6) months from the Commencement Date or such extension thereof as approved in writing by the Owner, which approval shall not be unreasonably withheld, and during the Defects Liability Period.
>
> For the avoidance of doubt, in the event the permission is extended, the Owner shall not be entitled to any additional Compensation except as that provided in Annexure A with supporting documentation.

[22] The appellant contended that by virtue of paras 5(1)–5(2) of the statement of defence, quite apart from the six months that the appellant was permitted to be on Lot 2391, the appellant was also permitted to be on Lot 2391 during the defects liability period. And cl 1.1 of the tol agreement defined the 'Defects Liability Period' to mean (see p 163 of the appeal record at *Jilid* 'C'):

> the period allocated for repair works, making good defects, rectification works, maintenance, supervision and renovation (if necessary) for the period of one (1) year commencing from the date of completion of the Works.

[23] And 'works' is defined in cl 1.1 of the tol agreement to mean (see p 163 of the appeal record at *Jilid* 'C'):

> the Works to be carried out on the Property in relation to the slope rehabilitation works including the cutting of trees, the cutting of slopes, the flattening of slopes, recovering the surface, building fences and accommodating channels as shown in the sketch which is enclosed as Annexure C during the Approved Period and the Defects Liability Period.

[24] It is crystal clear that the contention by the respondent that the appellant had breached the tol agreement by remaining on Lot 2391 exceeding the six months without the written authority of the respondent is untrue. When the appellant remained on Lot 2391 to complete the rectification works, it was done within the ambit and scope of the tol agreement.

THE APPELLANT FAILED TO PROVIDE AN 'AS-BUILT' DRAWING FOR THE WORKS WHICH WERE DONE ON LOT 2391

[25] The appellant contended at para 8.2 of the statement of defence that the appellant had forwarded to the respondent, by way of a letter dated 26 March 2002, a survey plan showing the actual affected land area for the works done under the tol agreement. That letter can be seen at p 226 of the appeal record at *Jilid* 'C' and it was worded as follows:

> NORTH-SOUTH EXPRESSWAY
>
> SLOPE REHABILITATION WORKS TO CUT SLOPE AT KM 72.9
>
> SOUTHBOUND BUKIT JENUN
>
> -As-Built Survey Plan
>
> ---
>
> We refer to the above matter.
>
> For your information, the surveyor has extended to PLUS a survey plan showing the actual affected land area for slope rehabilitation works at Bukit Jenun.

> We therefore forward to you a copy of the said survey plan no. JP/2002/MISC/259/B for your attention.

[26] The appellant's witness by the name of Faisal bin Abd Rahman ('SD2') confirmed the presence of the 'as-built' plan. And at p 227 of the appeal record at *Jilid* 'C', the 'as-built' plan bore the following number JP/2002/MISC/259/B and it was endorsed by a licensed surveryor. That being the case, the appellant had complied with the terms of the tol agreement by advancing the 'as-built' plan. Yet the respondent was not happy with the plan prepared by the appellant and refused to accept the same. The respondent then appointed its own surveyors by the name of Messrs TNO Consultants to prepare the 'as-built' drawing.

[27] The High Court judge relied on the testimony of the respondent's witness by the name of Ong Tai Ngee ('SP2') when His Lordship held that the 'as-built' drawing number JP/2002/MISC/259/B submitted by the appellant could not be used as it did not include the original and the 'as-built' contour, and it did not show enough bearings to enable a detailed and meaningful verification, despite the terms of the tol agreement which stated that the 'as-built' drawing number JP/2002/MISC/259/B had to be endorsed by a licensed surveyor.

[28] SP2 had this to say about the 'as-built' drawing plan JP/2002/MISC/259/B in his witness statement at p 115:

> I was requested by the Plaintiff Company to verify the accuracy of the land area indicated in the said survey plan no: JP/2002/MISC/259/B with the actual work done at the site. However, I was unable to do so as the plan does not include the original and as built contour neither does it indicate enough bearings to enable a detailed and meaningful verification.

[29] And the High Court judge made a finding in regard to the 'as-built' drawing number JP/2002/MISC/259/B at p 28 of the appeal record at *Jilid* 'A' in this way:

> (i) As built drawing No. JP/2002/MISC/259/B submitted by the defendant could not be used as it did not include the original and as built contour, neither does it indicate enough bearings to enable a detailed and meaningful verification - see the evidence of PW2, the engineer with TNO at Q & A No: 6 of Exhibit P.2 evidence goes (unchallenged).

[30] Notwithstanding that cl 3.1.9 of the tol agreement merely required the 'as-built' drawing to be endorsed by a licensed surveyor which was complied with, the High Court judge further made a finding that the appellant had

agreed to adopt the 'as-built' drawing prepared by Messrs TNO Consultants for measurement and calculation to assess the actual compensation. This was what His Lordship wrote in his judgment at p 28 of the appeal record at *Jilid* 'A':

> (ii) The defendant had agreed to adopt the 'as-built drawing' by TNO for measurement and calculation to assess the actual compensation. See Q&A No: 12 and 21 of Exhibit D2 (by DW1), Q&As No. 3 of Exhibit D3 (by DW2).

[31] It is wrong to say that the appellant failed to provide the 'as-built' drawing for the works to be done on Lot 2391. In fact, the appellant complied with cl 3.1.9 of the tol agreement by providing the 'as-built' drawing number JP/2002/MISC/259/B which was endorsed by a licensed surveyor and, in this context, there was no breach of contract by the appellant.

[32] However, Mohamad Amin bin Rosnan ('SD1') in his witness statement as seen at p 134 of the appeal record at *bahagian* 'B' testified that the 'as-built' drawing was prepared by the respondent through Messrs TNO Consultants. This was what SD1 said in his witness statement at p 134 of the appeal record at *Jilid* 'B':

> S12. Siapakah yang telah menyediakan 'as-built drawing' bagi kawasan atau keluasan sebenar tanah yang terjejas dengan kerja-kerja yang dijalankan.
>
> J12. 'As-built drawing' telah disediakan oleh Messrs TNO Consultants iaitu Juru ukur yang dilantik oleh Plaintif sendiri.

THAT THE APPELLANT FAILED TO CARRY OUT A JOINT FINAL INSPECTION WHICH WAS TO BE DONE WITHIN SEVEN DAYS FROM THE DATE OF THE COMPLETION OF THE WORKS

[33] In scrutinising this issue, it is ideal to refer to cl 3.1.1 of the tol agreement which sets out the obligation of the appellant (see p 165 of the appeal record at *Jilid* 'C'):

> 3.1.1 to pay the Compensation to the Owner in accordance with Annexure A within sixty (60) days from the date of the Final Certificate of Joint Inspection between the Owner's representative and PLUS'S representative. The Owner and PLUS shall instruct its representatives to conduct a preliminary joint inspection prior to the commencement of the Works and thereafter the final joint inspection shall be conducted within seven (7) days from the date of completion of the Works in order to assess the actual Compensation to be paid by PLUS.

[34] The respondent argued that no joint final inspection was ever held.

[35] The appellant argued to the contrary and submitted that the issue of

joint final inspection must be tied up with the issue of disagreement by the respondent with the 'as-built' drawing prepared by the appellant. Without the 'as-built' drawing, it was submitted by the appellant that no effective joint final inspection could be conducted.

[36] It was contended by the appellant that negotiation to carry out the joint final inspection commenced when the respondent prepared the 'as-built' drawing through Messrs TNO Consultants. Many attempts were made to conduct the joint final inspection but they did not materialise. Finally, on 29 October 2002, the parties had a discussion at the site. Since the parties could not agree as to the actual affected area pertaining to the dumping (filling) of the earth, the joint final inspection came to naught.

THAT THE APPELLANT FAILED TO REMOVE THE EXCAVATED EARTH FROM LOT 2391 AND THE EARTH WAS ALSO DUMPED ALL OVER LOT 2391, LOT 4197 AS WELL AS LOT 2392

[37] The respondent alleged that the appellant was responsible for the areas where the earth was dumped. The appellant, on the other hand, submitted that the dumping of the earth did not come within the scope of works of the appellant and, consequently, the appellant should not be held liable.

[38] Heavy reliance was placed by the respondent on cl 3.1.6 of the tol agreement which reads as follows (see pp 165–166 of the appeal record at *Jilid* 'C'):

> 3.1.6 to demobilise and remove all plant, equipment, labour, rubbish, surplus material and temporary works forthwith upon the expiration of the permission hereby granted or upon completion of the Works or upon receipt of any written instruction by the Owner to do so and leave the whole of the said Property and the surrounding area clean and in a workmanlike condition to the satisfaction …

[39] At para 5(d) of the statement of claim, the respondent averred as follows, in its original Malay language text (see pp 40–41 of the appeal record at *Jilid* 'A'):

> 5. Perjanjian tersebut mengandungi antara lain terma-terma berikut:
>
> (d) Defendan perlu memindah keluar dari Lot 2391 tersebut semua jentera, alat-alat, sampah-sarap dan bahan-bahan berlebihan bila kerja-kerja tersebut disiapkan dan dengan khususnya bahan-bahan yang digali (excavated material) dari Lot 2391 tersebut perlu dibuangkan di luar hartanah tersebut.

[40] By way of a rebuttal, the appellant relied on cl 3.3 of the tol agreement which reads as follows (see p 166 of the appeal record at *Jilid* 'C'):

> 3.3 The Owner shall be entitled to take and sell any severed trees and/or earth in the area of the said Property on condition that the said trees and/or earth are personally taken by the Owner without any interference, interruption or disturbance by any third party as soon as possible and its removal does not disturb, interfere or delay work to be done by PLUS for the purposes of the Works. If the Owner does not take the said trees and/or earth within fourteen (14) days, PLUS may take the said trees and/or earth either for sale or disposal, whichever PLUS may deem fit.

[41] Now, it cannot be denied that by virtue of cl 3.3 of the tol agreement, the respondent had requested the appellant's contractor GFE that no materials, particularly earth excavated, from Lot 2391 shall be removed or transported out of the said Lot. And this very averment can be seen at para 8.16 of the appellant's statement of defence.

[42] The June agreement favoured the appellant in that the appellant cannot be held responsible for the filling of the earth on Lot 2391 that was done pursuant to the June agreement entered between the respondent and GFE.

[43] In the context of taking and selling of the earth including the act of dumping, GFE was the agent of the respondent by virtue of the June agreement.

[44] Oh Lian Ching ('SP1') and SP2 have no personal knowledge in regard to the tol agreement and the June agreement. It was SP3 who signed both the agreements for the respondent. SP3 testified that he knew the contents of both the agreements but he was not aware of the consequences of the filling (dumping) of the earth onto the other Lots, namely, Lot 4197 and Lot 2392. It is germane, at this juncture, to refer to the case of *Serangoon Garden Estate Ltd v Marian Chye* [1959] 1 MLJ 113, where Chua J had this to say at pp 114–115 of the report:

> I think it is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, then, to use the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co.* [1951] 1 All ER 631, 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.' In *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, Scruttion LJ said 'When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not'.

[45] The effect of a written contract in the English language was explained by Gill J in *Subramanian v Retnam* [1966] 1 MLJ 172, at p 173, in this way:

It would appear that the learned magistrate was unduly influenced by the fact that no evidence was produced to show that the document was explained to the respondent who knows no English. If that was his reason or one of his reasons for dismissing the action, in my opinion he was wrong. For my saying so I find support in the following statement of the law, with which I respectfully agree, in the judgment of Wood Ag CJ, in *Ismail bin Savoosah & Ors v Hajee Ismail* [1889] 4 Ky 453, 458:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained.

[46] Be that as it may, the respondent alleged in para 8 of the statement of claim that the appellant filled the excavated earth from Lot 2391 onto Lots 2391, 2392 and 4197, particularly the East facing slope, without taking adequate measures to stabilise the slope. The original Malay language text of para 8 of the statement of claim has since been reproduced and emphasis was made in regard to the Eastern segment.

[47] But the East facing slope is not within the scope and contemplation of the tol agreement.

[48] A perusal of the tol agreement showed that the respondent's scope of work is confined to the West facing slope of Bukit Jenun facing the North-South Highway by introducing 'berms' to the slope, concrete cascade drains and close turfing. According to Wikipedia, the free encyclopedia, 'Berms are also used to control erosion and sedimentation by reducing the rate of surface run off'.

[49] The June agreement between the respondent and GFE listed the parameters of what the respondent agreed to allow GFE to maintain the slope. Clause 3.1 of the June agreement stipulates that, 'GF (referring to Green Field Engineering Sdn Bhd) shall construct back the slope platform as per PROJECT design profile, i.e. 1:2 ratio slope complete with (c/w) proper compaction'. While cl 3.2 of the June agreement states that, 'GF (referring to Green Field Engineering Sdn Bhd) to furnish with cover crops turfing to all at fill slope area'. These two clauses in the June agreement must be construed against the respondent and, at this juncture, it would be inequitable for the respondent to argue and raise the issue that the respondent had objected to the dumping and did not know about the consequence of the dumping after having consented in writing to the dumping. I now call in aid the doctrine of

estoppel in favour of the appellant by referring to the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] CLJ 283, a decision of the Federal Court. There, Gopal Sri Ram JCA writing for the Federal Court, had this to say at p 344 (MLJ); p 294 (CLJ) of the report:

> The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[50] Exploring the evidence, I now turn to the evidence of SD2. He testified that the actual land slide in the area happened earlier than the year 2000. He testified that as soon as the land slide occurred, the appellant swiftly acted to contain the land slide.

[51] The evidence led and the documents referred to in the course of the trial showed that the respondent's representatives were aware of the actions of the appellant and GFE and it would appear that the respondent condoned and authorised what the appellant did. Consequently, the respondent cannot now be allowed to retract any authorisation that had been given contractually.

[52] If there is any breach of the June agreement between the respondent and GFE, the respondent has the option of suing GFE. But this what not done.

[53] The High Court judge erred in law and in fact when he ruled that the appellant failed to remove the excavated earth from Lot 2391 and that the appellant had dumped the earth on Lots 2391, 2392 and 4197 without taking adequate measure to stabilise the slope. His Lordship also erred in law and in fact when he ruled that the excavation and the dumping by the appellant breached cl 3.1.6 of the tol agreement without fully appreciating the scope of cl 3.3 of the tol agreement which categorically states that the onus was on the respondent to dispose of the earth, failing which the appellant may sell and dispose of the earth.

[54] The High Court judge further erred in law and in fact when he failed to address his mind to the fact that the respondent, in discharging its obligation pursuant to cl 3.3 of the tol agreement, had entered into the June agreement with GFE — the appellant's contractors, and the respondent had instructed GFE to dump the excavated earth on Lots 2391, 2392 and 4197 belonging to the respondent.

[55] The High Court judge also erred in law and in fact when he ruled that

GFE was acting on behalf of the appellant when GFE dumped the earth on Lots 2391, 2392 and 4197. In so doing, His Lordship had, with respect, misinterpreted the last sentence in the June agreement between the respondent and GFE and failed to take note that the appellant was present at the signing of the June agreement. The last sentence of the June agreement carried the following legend:

> The aforesaid agreement and understanding shall be witnessed and endorsed by all parties involved.

[56] The High Court judge also erred in law and in fact when he ruled that the June agreement between the respondent and GFE included the appellant without fully appreciating cl 3.3 of the tol agreement and the underlying reason of the June agreement which was to assist the respondent in fulfilling its obligations under the tol agreement.

[57] The High Court judge also erred in law and in fact when he ruled that since June agreement between the respondent and GFE included the appellant as a party, then the appellant was vicariously liable for the negligence of GFE in dumping the earth on Lots 2391, 2392 and 4197 without fully appreciating the fact that the dumping was done on the instructions of the respondent since the latter was acting in pursuance to cl 3.3 of the tol agreement.

[58] The High Court judge further erred in law and in fact when he ruled that the appellant was vicariously liable for the acts of GFE without taking into account that the respondent was using GFE as a channel to fulfill its obligations under the tol agreement.

[59] In so holding that the appellant was vicariously liable for the acts of GFE in negligently dumping the excavated earth, the High Court judge overlooked the fact that by virtue of the June agreement, GFE was the agent of the respondent. In his written grounds of judgment, the High Court judge had this to say at p 30 of the appeal record at *Jilid* 'A':

> GFE, the defendant's contractor is acting on behalf of the defendant. The TOA is entered between the plaintiff and defendant. The defendant relied on their contractor (GFE) to fulfill their obligation under the TOA with plaintiff, whom had failed and neglect to fulfill their obligation.
>
> The defendant in failing to carry out their obligation pertaining to the understanding causing losses and damages to the plaintiff's land, cannot now seek to shift the responsibility to their contractor. GFE who is undoubtedly the defendant's representative in all dealings and transactions with the plaintiff (refer to notes of proceedings at page 15 at line 7 & 8). The defendant cannot escape liability by

delegating the performance of the work to their contractor and pass the burden when the responsibility and duty are theirs which is non-delegable. The defendant remains vicariously liable to the plaintiff.

[60] Vicarious liability principle hinged on the argument that the employers benefit from the work of their employees and so the employers should be liable for any damage that the employee may cause in the course of its performance. But there are cases where the employees may have technical skills and knowledge not shared by their employers and in such a case, the employers cannot be held vicariously liable for the negligence of the employees.

[61] In the majority of cases, the present case is not an exception, the employers are financially strong and would be able to meet any claim. But the employers would be absolved if it is shown that the employees were 'on a frolic of their own'. A classic example would be the case of *Hilton v Thomas Burton (Rhodes) Ltd and Another* [1961] 1 WLR 705. That was a case where four workmen were out in their employer's van, which they were allowed to use for the purpose of travelling to work on a demolition site way out in the country. After only half a day's work, the four workmen decided to stop and proceed to a cafe some seven or eight miles away for tea. They proceeded to the cafe and were nearly there when they changed their minds and decided to return. On their return journey, there was an accident, and one of them was killed through the negligent driving of another. The court held that the employer was not to be vicariously responsible because the four workmen were not acting in the course of their employment. The court described what the four workmen did as 'on a frolic of their own'.

[62] Another case in point would be that of *Storey v Ashton* (1869) LR 4 QB 476. In that case, the facts showed that some employees had finished delivering wine for their employers and were on their way back after their official work hours were over. They decided to take a detour for the purpose of visiting a relation of one of the employees. On the way, they negligently ran over the claimant. The claimant's attempt to sue the employers failed because the employees were treated as being on a 'new and independent journey' from their work trip at the time of the accident.

[63] There is yet another case. It is the case of *Heasmans v Clarity Cleaning Co Ltd* [1987] IRLR 286 where the employee of a cleaning contractor was employed to clean telephones. While carrying out his duty, he used the telephones to make private long distance calls from client's premises. The court held that the defendants were not vicarously liable because the unauthorised use of the telephone was not connected with cleaning it and therefore could not be regarded as the act of cleaning in an authorised manner.

[64] These three cases which I referred to are good examples of vicarious liability cases simpliciter. The first two cases relate to vicarious liability tied up with negligence. The last case pertained to an unauthorised use of the telephone that exculpated the employer from liability.

[65] The case of *Rose v Plenty And Another* [1976] 1 WLR 141 (CA), concerned an express prohibition. That was a case where a milkman had been told by his employer to neither permit passengers on his float, nor allow children help him deliver the milk. He disregarded those orders and paid the claimant, who was 13 years of age, to help him deliver the milk. The claimant was injured while riding on the vehicle because of the milkman's negligent driving. The defendants were held vicariously liable because the prohibition did not affect the job which the milkman had to do, it was only in relation to the way in which he should do it. The court further held that the boy was helping with the deliveries and that was construed as furthering the employer's business. It appeared that the court was influenced by the fact that compensation for the boy could only be secured by making the employer vicariously liable through the employer's insurance.

[66] The High Court judge in his written grounds of judgment cited and considered cases like *Mohamad Khalid bin Yusuf v Datuk Bandar Kuching Utara* [2007] 5 MLJ 414; [2007] 9 CLJ 314; *Ng Kim Cheng v Naigai Nitto Singapore Pte Ltd & Anor* [1991] 2 MLJ 296; [1991] 4 CLJ (Rep) 1009; and *Wilsons & Clyde Coal Company Limited v English* [1938] AC 57 (HL). These are interesting cases and they relate to instances of delegation of works by the employer to an independent contractor and the work was performed negligently and the employer was held vicariously liable for the negligence of the independent contractor. These cases centred on the issues of negligence and the non-delegable onus of the duty of care in a claim relating to the tort of negligence.

[67] Negligence is a tort and three things must be proved to support the claimant's claim:

(a) that the defendant owes the claimant plaintiff a duty of care;

(b) that the defendant is in breach of that duty of care; and

(c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.

[68] According to Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, p 784:

A Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

[69] The standard of conduct to determine negligence is that of the B reasonable man. It is an objective test.

[70] The *Caparo* test derived from the case of *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is usually applied to cases involving physical injury and/or damage to property. The *Caparo* test requires the court to ask three basic C questions:

(a) whether the damage is reasonably forseeable?;

(b) whether there is a relationship of proximity between the claimant plaintiff and the defendant?; and

D (c) whether it is just, fair and reasonable to impose a duty in such a situation?.

[71] These brief insights into the law are certainly thought provoking. Even the dullest individual would be stirred to think and ponder. But, unfortunately, E the respondent has not pleaded negligence nor have they pleaded vicarious liability in their pleadings. It is trite law that the court ought to be bound by the pleadings of the parties in as much as the parties themselves should be bound by their own pleadings. Here, vicarious liability and negligence were not specifically pleaded in the statement of claim. Here too, the principles of F negligence have not been proved by the respondent.

[72] Be that as it may, the High Court judge erred in law and in fact when he concluded that there was an act of negligence by GFE and the appellant was vicariously liable for what GFE did without taking into account that all acts of G dumping of the excavated earth were done on the instructions of the respondent based on the June agreement. It must be borne in mind that the obligation to remove the excavated earth under the tol agreement is on the respondent.

H **[73]** The High Court judge also erred in law and in fact when he ruled that the respondent had proved negligence on the part of the appellant on the balance of probability without considering the salient fact that it was the intervening act of the respondent in instructing GFE to dump the excavated earth that caused the negligence.

I

THAT THE APPELLANT FAILED TO PROVIDE COMPENSATION TO THE RESPONDENT ACCORDING TO THE SPECIFIED SCALE

[74] According to Asquith LJ in *Hadley and Another v Baxendale and Others*

(1854) 9 Exch 341, 'the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed'.

[75] What Lord Blackburn said in the context of tort and contract in the case of *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25, at p 39, as to the measure of damages ought to be reproduced. There His Lordship said:

> … that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[76] This short and brief statement of the law by Lord Blackburn has been approved and applied in the following cases:

(a) *Banco de Portugal v Waterlow And Sons, Limited, Waterlow And Sons, Limited v Banco de Portugal* [1932] AC 452 (HL), at p 474, per Viscount Sankey LC;

(b) *Monarch Steamship Co, Limited v Karlshamns Oljefabriker (A/B)* [1949] AC 196 (HL), at p 221, per Lord Wright;

(c) *British Transport Commission v Gourley* [1956] AC 185, at p 197, per Earl Jowitt;

(d) *Koufos v C Czarnikow Ltd, The Heron II* [1969] 1 AC 350 (HL), at p 420, per Lord Upjohn;

(e) *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 (HL), at p 824C, per LorddWilberforce;

(f) *Swingcastle Ltd v Gibson Alastair (a firm)* [1991] 2 AC 223 (HL), at 232D, per Lord Lowry; and

(g) *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), at p 562G, per Lord Jauncey of Tullichettle.

[77] While Lord Diplock defined it differently in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL), at p 841C in this way:

> … to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so.

[78] At the local scene, Ong Hock Thye FJ in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 (FC), spoke of the burden of proof in this way (see p 100 of the report):

The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed.) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 at 178:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it.

[79] Now, nominal damages are 'a sum of money that may be spoken of, but that has no existence in point of quantity' per Maule J in *Beaumont v Greathead* (1846) 2 CB 494, at p 499.

[80] A token sum is usually awarded for nominal damages and the amount could be small or miniscule. Just like sixpence in *Feize v Thompson* (1808) 1 Taunt 121; a farthing in *Mostyn v Coles* (1862) 7 H & N 872; and a shilling in *Sapwell v Bass* [1910] 2 KB 486.

[81] Here, the respondent itemised its losses and damages in paras 13A–13E of the statement of claim as reproduced in the early part of this judgment. I will now elaborate in some detail.

PARAGRAPH 13A OF THE STATEMENT OF CLAIM

[82] Under this paragraph, the respondent based its claim for Lots 2391, 2392 and 4197 based on the letter dated 31 December 2002 from Messrs TNO Consultants as seen at p 246 of the appeal record at *Jilid* 'C'. Based on Messrs TNO Consultants calculation, the respondent seeks to be compensated for the 'cut' and 'fill' for the said works. But the appellant refuses to compensate the respondent for the 'fill' because this is essentially caused by the respondent's own action in authorising or contracting with GFE under the June agreement for the earth to be neither removed nor used to 'fill' those lots. It seems that the appellant only agrees to compensate the respondent the sums as stipulated in answer to question 24 of the witness statement of SD1 as seen at pp 136–137 of the appeal record at *Jilid* 'B' which reads as follows in the original Malay language text:

> S24: Boleh kamu tunjukkan kiraan tersebut?
>
> J24: Kiraan adalah seperti berikut:

Jumlah kawasan di Lot 2391 (1-4)

Bahagian 1	1672.39 sq.m	
Bahagian 2	795.69 sq.m	
Bahagian 3	2325.78 sq.m	
Bahagian 4	3813.00 sq.m	
	8606.86 sq.m =	92,641.22 s.ft

Pengiraan seperti di bawah adalah berdasarkan kepada 'Temporary Occupation Agreement':

(i) Tanah:	RM6 p.s.f. x 30% x keluasan tanah yang terlibat	
=	6x30x92.641.22 /100	
=	RM166,754.19	
(ii) Pokok:	Kelapa sawit	
	Penilaian sebelum:	Jumlah Pokok x RM129 setiap pokok
		= [180 (untuk 24,218.76 sq.fit)] x RM129 setiap pokok
		= 134.55x129
		= 92,614.22
		= 92,614.22/134.55 = 688 pokok
		= 688x129.00
		= RM88,819.90

Anggaran kos untuk bayaran ex-gratia untuk kawasan yang dimasuki:

Tanah	RM166,754.19
	+
	RM88.819.90
	RM255,574.09
Pampasan yang sudah dibayar:	RM66,813.76
	RM188,760.33

[83] Thus, the appellant is willing to pay damages to the respondent in the sum of RM255,574.09 and out of this amount the sum of RM66,813.76 has been paid, leaving a balance sum of RM188,760.33 which is due and forthcoming from the appellant to the respondent.

[84] The respondent's witness in the person of SP2 testified that he made the

A calculation based on his 'Memorandum' as seen at pp 277–280 of the appeal record at *Jilid* 'C' using the system known as 'planimeter'. Under cross-examination, SP2 testified that the variation in the calculation using the system 'planimeter' and the system 'autocad' is minimal.

B **[85]** The High Court judge erred in law and in fact when he ruled that the measurements and calculations of the consultants of both the parties differed tremendously. And on this basis, His Lordship then proceeded to accept the calculation and measurement of the respondent's consultant as being more accurate, despite the fact that the appellant's consultant had considered the C 'cut' and 'fill' areas affected by the dumping which the respondent's consultant did not even consider.

[86] The High Court judge also erred in law and in fact when he accepted as unchallenged the measurement and calculation of plot 3 given by the D respondent's consultant and he ruled that there were no measurements given by the appellant's consultant for plot 3 without directing his mind to the fact that plot 3 measurement was in fact the area affected by the issue of dumping which the appellant alleged was done on the instructions of the respondent.

E **[87]** No figure was provided by the appellant in regard to plot 3 because it was a filled area where the earth was dumped. The defence of the appellant was quite simple. It was the responsibility of the respondent to take out the earth from the work area pursuant to cl 3.3 of the tol agreement read together with F the June agreement.

[88] A question may be posed. After the cutting, where would the earth be disposed of? The answer would be by the side and the tol agreement allows the respondent as the owner of the lands to take the earth and the trees out. Filling G is actually dumping. According to SD1, at p 81 of the appeal record at *Jilid* 'B' under cross-examination that, 'Runtuhan tanah berlaku dalam bulan Januari 2000' and the appellant undertook temporary remedial works and then the June agreement was signed. This was followed by the tol agreement.

H **[89]** In regard to the issue of dumping, the learned High Court judge erred in law and in fact when he accepted the evidence of SP1 and SP2 on this issue, notwithstanding the fact that both these two witnesses testified that they have not seen the tol agreement and the June agreement. That being the case, these two witnesses had no knowledge and were not privy to the issues of earth I excavation and dumping.

[90] It is germane to mention that SP3 was unable to substantiate as to how he arrived at the quantum for the costs per cubic metre for the restoration of the slope except that he based the quantum which he quoted purely from his own

experience. Yet the High Court judge accepted the evidence of SP3 on this point. In my judgment since no evidence was led to show how the respondent came to the figure of RM1,958,211.10, the respondent's claim for this sum should not be allowed.

[91] Under this paragraph, the High Court judge allowed the respondent's claim for RM1,958,211.10 notwithstanding the failure on the part of the respondent to lead any evidence during the trial as to how this amount was arrived at and the basis for the measurement of the area as stipulated in the 'Particulars' to para 13 of the statement of claim as reproduced in the early part of this judgment.

[92] It is appropriate to state that both the affected areas calculated by the respondent and the appellant were derived from the plan of Messrs TNO Consultants.

[93] While the respondent insisted and is adamant that the affected areas were confined to the 'cut' and 'fill' portions, the appellant insisted that the area affected was confined to the 'cut' portion only. Consequently, the appellant avers that the respondent is only entitled to the sum of RM188,760.33 being the additional area affected and I agree that it is only this sum that is due to the respondent.

PARAGRAPH 13B OF THE STATEMENT OF CLAIM

[94] This paragraph concerned the surveyor's fees itemised at RM36,190.76 in the statement of claim. It is part and parcel of special damages and it must be specifically pleaded and prayed for. And such evidence cannot be led unless it is specifically pleaded (*Hayward and Another v Pullinger & Partners Ltd* [1950] 1 All ER 581).

[95] It is trite that even if special damages are pleaded, it must be adequately particularised (*Ilkiw v Samuels and Others* [1963] 1 WLR 991 (CA)).

[96] Undaunted, learned counsel for the respondent referred to the Federal Court case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, where the Federal Court held at p 160 that, 'prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning'. In the context of the present appeal, para 14(f) of the statement of claim averred that:

> Lain-lain relief atau perintah selanjutnya yang dianggap patut oleh Mahkamah.

[97] And the English language translation would read as follows:

> Any other relief or consequential order that the Court deems fit.

[98] Now, while acknowledging that a prayer of this nature should not be treated 'as a mere ornament to pleadings devoid of any meaning', the discretion is nonetheless placed on the court to make the 'consequential order that the Court deems fit'. With respect, it is not mandatory for the court to make the consequential order if the court does not feel inclined to do so. With respect, the rule that the parties are bound by their pleadings is of universal application and is entrenched in our procedural law and it is captured in our O 18of the Rules of Court 2012 (previously O 18 of the Rules of the High Court 1980). I have in the early part of this judgment alluded to the object of pleadings which calls for the parties to plead the material facts so that neither party will be taken by surprise at the trial. And the court too will only decide the suit based on the pleadings. To put it in another way, the trial of the suit is confined to the pleadings.

[99] Factually speaking, the facts in *Lim Eng Kay* are poles apart from the present appeal. There, the respondent was injured in an accident between the motorcycle ridden by him and a motorcar driven by the appellant. He sued the appellant for general and special damages. Liability was agreed between the parties in the ratio of 90% against the appellant and 10% against the respondent. The respondent was a trained school teacher and was undergoing a course in social science at University Science Malaysia, Penang. At a result of the road accident, the respondent sustained a severe brain injury and fractures of the right thigh bone and jaw bone. Only quantum was disputed. Here, in the present appeal, as demonstrated in the early part of this judgment, the facts are entirely different and the High Court judge decided the case contrary to the pleadings.

[100] It is rather unfortunate that the respondent failed to plead para 13B in para 14 of the statement of claim. This court is not inclined nor does it deem fit to make any consequential order in favour of the respondent for its oversight in drafting the statement of claim. Consequently, the respondent is not entitled to this claim.

PARAGRAPH 13C OF THE STATEMENT OF CLAIM

[101] The claim under this paragraph is colossal. It is for RM11,846,694. But learned counsel for the respondent pointed out that no work was done to support this claim because the respondent had no money to do the work. It is a concession. A magnanimous gesture and, consequently, this claim in para

13C of the statement of claim should not be allowed. At any rate, the respondent failed to plead this claim in para 14 of the statement of claim.

[102] It must be borne in mind that para 13C of the statement of claim did not allude to negligence and vicarious liability, yet it made reference to the acts of stabilising the hill slope at the East ('menstabilkan cerun bukit yang berhala Timur'). Learned counsel for the respondent argued that para 13C of the statement of claim should fall under the category of general damages which could happen in the future. SP1 and SP2 testified that the slope was already unstable. And SP1 quantified the sum of RM7,710,000 being the total estimate cost of the remedial works as reflected in his witness statement at paras 10–12. While para 13C of the statement of claim itemised the quantum at RM11,846,694. However, the High Court judge in his judgment, awarded the costs of restoration at RM9,951,000. With respect, these sums are mere estimates for the future and nothing else (*Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593 (CA)).

[103] In my judgment, the respondent is not entitled to a single cent under para 13C of the statement of claim because the issues of negligence and vicarious liability were never pleaded by the respondent and yet considered by the High Court judge.

PARAGRAPH 13D OF THE STATEMENT OF CLAIM

[104] SP3 under cross-examination admitted that the sum of RM196,721.27 stipulated in para 13D of the statement of claim was not the right figure. It should be RM99,487.50 as reflected at p 248 of the appeal record at *Jilid* 'C'.

[105] SP3 also testified that the sum of RM99,487.50 was the estimated fees of the consultant and yet the High Court judge allowed the consultant fees at RM99,487.50. It was just a mere estimate.

[106] Again, the High Court judge erred in law and in fact when he allowed the consultant engineer fees and the surveyor fees of RM196,721.27. His Lordship also allowed separately the surveyor fees of RM36,190.76 and this amounted to a double claim that was brought up during the cross-examination of SP3.

[107] Unfortunately, the respondent failed to plead this claim in para 14 of the statement of claim. Consequently, the respondent is not entitled to this claim.

A PARAGRAPH 13E OF THE STATEMENT OF CLAIM

[108] SP3 under cross-examination, was unable to substantiate the claim under this paragraph by way of any documentary evidence. That being the case, the respondent is not entitled to this claim.

B

BREACH OF CONTRACT, NUISANCE, THE PRINCIPLE OF *RYLANDS v FLETCHER* AND TRESPASS

C **[109]** All these were pleaded by the respondent in the statement of claim. For breach of contract, it was pleaded at para 7 of the statement of claim. While nuisance was pleaded at paras 8 and 10 of the statement of claim. The principle of *Rylands v Fletcher* was pleaded at para 8 of the statement of claim. Trespass, on the other hand, was pleaded at para 10 of the statement of claim.

D

[110] SP3, in his witness statement at p 123 of the appeal record at *Jilid* 'B', alluded to nuisance, the rule in *Rylands v Fletcher* and trespass in this way. At para 13(c) of the appeal record at *Jilid* 'B', SP3 said:

E (c) The plaintiff may be subject to claims from the surrounding residents for nuisance or actions (based) on the principle in Rylands v. Fletcher.

[111] At para 15 of p 123 of the appeal record at *Jilid* 'B', SP3 had this to say:

F 15. The defendant by disposing the earth and materials excavated from Lot 2391 onto the plaintiff's other lands i.e. Lot 4197 and Lot 2392 had trespassed on the said lands and also caused nuisance.

G **[112]** The High Court judge in his grounds of judgment under subheading 'Decision' at p 28 right up to p 35 of the appeal record at *Jilid* 'A', did not consider whether the principle of *Rylands v Fletcher* was applicable to the factual matrix of the case. His Lordship too did not decide the case based on nuisance and trespass.

H

[113] Surprisingly, His Lordship in his grounds of judgment as alluded to earlier made references to negligence and vicarious liability which were not pleaded at all. His Lordship decided the case purely on the breach of contract but vicariously liability do not apply in a breach of contract situation.

I

[114] *John Rylands and Jehu Horrocks v Thomas Fletcher* (1868) LR 3 HL 330; (1865) 3 H&C 774 is an old English case and it is commonly referred to as the *Rylands v Fletcher* case. It was decided in 1865 and it is a common law rule of strict liability. It has been applied in Singapore way back in 1957 in the

case of *Ang Hock Hai v Tan Sum Lee & Anor* [1957] 1 MLJ 135, a case concerning the escape of petrol or other inflammable material which caught fire. *Ang Hock Hai*'s case recognised *Rylands v Fletcher* as a cause of action in the law of torts which is distinct from nuisance and negligence.

[115] In Malaysia, *Rylands v Fletcher* was recognised in *Hoon Wee Thim v Pacific Tin Consolidated Corporation* [1966] 2 MLJ 240 which was upheld by the Federal Court subnom *Pacific Tin Consolidated Corporation v Hoon Wee Thim* [1967] 2 MLJ 35.

[116] The facts in *Rylands v Fletcher* may be stated as follows. There, the defendant had employed contractors to build a reservoir on his land to supply water for his factory. The contractors negligently failed to block a disused mineshaft and when the reservoir was filled to the brim, the plaintiff's adjoining mine was flooded. At first instance, Blackburn J in his judgment, in the Court of Exchequer Chamber, aptly said:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

[117] The House of Lords affirmed the decision of Blackburn J, subject to the addition of the requirement that the defendant's user of his land should be non-natural.

[118] In *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53, the House of Lords examined the rule in *Rylands v Fletcher*. The facts in *Cambridge Water* may be stated as follows. The plaintiff there brought an action

for injunctive relief and damages in respect of the pollution of groundwater. The plaintiff was prevented by this pollution from using water pumped from his borehole for the purpose of supplying water to the public. In 1983, an investigation showed that a chemical called PCE had entered the water supply and this resulted in the plaintiff to cease pumping water for public supply because the level of PCE contravened a certain legislation. After investigation, the source of the chemical was traced to the defendant's premises who used the chemical called PCE in its tanning business. The plaintiff suffered loss estimated at £900,000. At first instance, the court dismissed the *Rylands v Fletcher* claim because there was no non-natural user. The nuisance action also failed because the damage was unforseeable.

[119] However, the Court of Appeal in *Cambridge Water* held the view that in some areas of nuisance, negligence played no part. The plaintiff alleged interference with a right enjoyed as an incident of ownership of the land. This right relate to naturally occurring water which came beneath the land by percolation in undefined underground channels. That the chemical PCE was spilt by accident by the defendant was held to be irrelevant.

[120] But the House of Lords in *Cambridge Water* held that foreseeability of damage was a prerequisite of liability in *Rylands v Fletcher*. And that liability arose only if the defendant knew or ought reasonably to have foreseen that those things might, if they escaped, cause damage. It was also held that the same test applies in nuisance.

[121] The House of Lords in *Cambridge Water* further held that the defendant could not have reasonably foreseen that the seepage of the chemical PCE through the tannery floor could have caused the pollution of the plaintiff's borehole and therefore was held not to be liable under the rule in *Rylands v Fletcher*. And by way of per incuriam, it was also held that the storage on industrial premises of substantial quantities of chemicals constituted a non-natural use, even in an industrial complex.

[122] So, the rule in *Rylands v Fletcher* in all its splendour was not even considered by the High Court judge in his written grounds of judgment.

[123] Next, in regard to nuisance, I have this to say. There are three types of nuisance: private, public and statutory.

[124] Private nuisance concerns the unreasonable interference with another's use or enjoyment of land. In determining what is reasonable, the court will balance each party's right to use the land as they wish.

[125] The elements of the tort of private nuisance are:

(a) indirect interference with the enjoyment of the land;

(b) that such an interference was unreasonable; and

(c) that the interference had caused damage to the claimant.

[126] In regard to the element of interference, it is the duty of the claimant to prove that the defendant has caused an interference with the claimant's use or enjoyment of the land. The interference must be as a result of a continuing state of affairs rather than a one-off incident. Examples of physical invasion of the claimant's land are found in *Davey v Harrow Corporation* [1958] 1 QB 60 (CA), where the roots of a neighbour's tree spread into the claimant's land, or in *Sedleigh-Denfield v O'Callaghan and others* [1940] AC 880 (HL), where water flooded onto the land as a result of what the neighbour had done, or in *Christie v Davey* [1893] 1 Ch 316 where nuisance was caused by a noise, or in *Wheeler and another v JJ Saunders Ltd and others* [1996] Ch 19; [1995] 2 All ER 697 (CA), where the smell caused the nuisance.

[127] In regard to the element of unreasonableness, the claimant's enjoyment of his land constitutes nuisance if it can be considered unreasonable. An interference which goes beyond the normal bounds of acceptable behaviour will be unreasonable (*Southwark London Borough Council v Mills And Others* [1999] 2 WLR 409 (CA)).

[128] In regard to the element of damage, it envisages a situation where the interference must have caused damage to the claimant like the case of *The Directors, etc of the St Helen's Smelting Company v William Tipping* [1865] 11 HLC 642 where the fumes from the copper-smelting works seriously damaged the trees and shrubs that grew on the claimant's land.

[129] Public nuisance, on the other hand, is a crime and it is dealt with by the attorney-general's chambers through prosecution under the criminal law. However, in some cases where the parties who have suffered as a result of a public nuisance may commence a suit in tort.

[130] Statutory nuisance concerned those offences under various statutes concerning public health and environmental issues. It is inapplicable in this case.

[131] Trespass was not canvassed by the High Court judge in his written grounds of judgment. Essentially, trespass to land involves some form of interference with the land. It is actionable per se. A continuing trespass justifies a series of legal actions for as long as it lasts. If an object is placed on the

claimant's land, the trespass will continue until the object is removed. A classic example would be the case of *Susanna Holmes v Wilson and Two Others* [1839] 10 Ad & E 502 where the highway authorities constructed a road supported by buttresses located on the claimant's land. It was held to be a trespass and damages had to be paid.

[132] I have demonstrated briefly the legal semantics on nuisance and trespass which were not alluded to by the High Court judge in his written grounds of judgment.

[133] This is a fit case for appellate intervention. The advantage enjoyed by the High Court judge by reason of his having seen and heard the witnesses could not sufficiently explain or justify His Lordship's conclusion. The High Court judge has not taken proper advantage of his enviable position of having seen and heard the witnesses and such failure has put the matter at large for this court to peruse and dissect the facts and the law based on the appeal records. A non-direction of this magnitude constitutes a fundamental misdirection and it invites appellate intervention.

[134] For the varied reasons alluded to in this judgment, the appeal of the appellant must be allowed with costs of RM50,000. The decision of the High Court judge must be set aside forthwith. The deposit lodged to be refunded to the appellant.

[135] Through the evidence of SD1, the appellant agreed that a sum of RM188,760.33 is due to the respondent and it is this sum that is ordered to be paid by the appellant to the respondent forthwith. It is so ordered accordingly.

[136] This judgment received the concurrence of my learned brothers A Samah Nordin, JCA and Linton Albert, JCA and it is the unanimous decision of this court.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor